BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NOAH R. NEAL	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,014,727
SEATON CORPORATION, d/b/a STAFF MANAGEMENT	)	
Respondent	)	
AND	)	
	)	
AMERICAN CASUALTY COMPANY OF READING PENNSYLVANIA/CNA	)	
Insurance Carrier	)	

ORDER

Both claimant and respondent appeal the December 7, 2005 Award of Administrative Law Judge Thomas Klein. Claimant was awarded a permanent partial general disability of 47 percent to the body as a whole for injuries suffered on December 7, 2003. The Appeals Board (Board) heard oral argument on March 28, 2006.

APPEARANCES

Claimant appeared by his attorney, Dennis L. Phelps of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, John David Jurcyk of Roeland Park, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ). In addition, by letter of April 3, 2006, the parties advised the Board that they have stipulated to an average weekly wage of $380.20. Therefore, claimant's average weekly wage will no longer be at issue before the Board.

ISSUES

1. What is the nature and extent of claimant's injury? What, if any, functional impairment did claimant suffer as a result of the injuries on December 7, 2003?

2. Is claimant entitled to a work disability pursuant to K.S.A. 44-510e, when considering claimant's task loss was, to a significant degree, precluded by permanent restrictions from a prior injury?

3. Did claimant put forth a good faith effort in obtaining and/or retaining his employment? If not, should a wage be imputed pursuant to K.S.A. 44-510e?

4. Was claimant's termination for his refusal to take a post-accident drug test, as mandated by the employer's policy, a lack of good faith sufficient to deny claimant a permanent partial general work disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds as follows:

Claimant worked for respondent for approximately three to four weeks at a location identified as Amazon. Claimant's work as a line worker at Amazon included pushing, pulling, bending and twisting on a regular basis, and involved unboxing and reboxing up to 1,600 to 2,000 boxes per day. Claimant testified that he injured himself in the course of his employment, with the injury being reported to respondent on December 7, 2003. Claimant stated that on that date, as he was bending over, he felt a severe pain in his low back.

After reporting the accident, claimant was sent to what he described as a first aid station, which is also identified in this record as the mash unit.[1] (Don Gray, respondent's operations manager, identified this facility as the "mast" unit, meaning the first aid station.[2]) While at the first aid station, claimant was asked to assist in filling out an accident report. Claimant's description of the incident indicated that he was nearly imprisoned in the first aid station, alleging that he was prohibited from leaving by several of respondent's employees. Jeremy Chanley, respondent's account supervisor, described the incident as an attempt to complete paperwork with claimant's assistance. However, he testified that claimant was uncooperative and ultimately left the unit without completing the paperwork.

The next day, December 8, 2003, claimant was referred to the Coffeyville Medical Clinic. According to Mr. Gray's testimony, at some time during that day, Mr. Gray received

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[1] R.H. Trans. at 14.

[2] Gray Depo. at 6.

a phone call from the receptionist at the clinic, indicating that claimant was refusing to take the post-accident drug screen, which would have necessitated a urine test. Mr. Gray testified that he spoke to claimant by telephone, advising that the post-accident drug screening and alcohol screening were necessary, and if claimant refused, he would be subject to termination. Mr. Gray also testified that claimant advised him that his attorney advised him that he did not have to do that.[3] Mr. Gray also testified that claimant advised "he had not gone to the bathroom in four days" and "was not going to sit around there all day and wait to go to the washroom."[4] Mr. Gray further testified that shortly after that, claimant laid down the phone and departed the clinic without providing the requested urine samples.[5] According to claimant's testimony, he was sent home by the doctor's office since he was unable to provide the sample.[6]

Claimant testified that he was having difficulty urinating and was unable to do so due to the significant pain he was in. Claimant stated he remained at the doctor's office for approximately three hours, but was unable to provide the sample. On cross-examination, claimant also testified that on both the date of accident and the day after, he was urinating blood.[7]

Shortly after, it was determined that claimant's employment should be terminated due to his failure to provide the required urine test after the work-related accident. Both Mr. Chanley and Mr. Gray testified that it was company policy to test any individual who suffered a work-related accident for both drugs and alcohol.

Mr. Chanley also testified that claimant would have been retained in an accommodated position at his regular wage had he not been terminated due to his refusal to provide the urine sample. Mr. Chanley stated that this company would do everything within its power to accommodate a worker within his or her restrictions and the accommodation would be at the salary that the worker was hired at.

This matter went to hearing in February of 2004, at which time Philip R. Mills, M.D., board certified in physical medicine and rehabilitation, was appointed as claimant's authorized treating physician. It was also ordered from that hearing that claimant would submit to a drug test, although this record contains no record of any drug test being administered pursuant to this order.

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[3] *Id*. at 11-12.

[4] *Id.* at 12.

[5] *Id.* at 12.

[6] R.H. Trans. at 15.

[7] *Id.* at 31.

Dr. Mills provided claimant with medical treatment for his work-related injury, including medication, and ordered claimant to undergo an MRI. The MRI revealed a far lateral disc herniation at L5-S1. Claimant was referred to board certified neurosurgeon John Hered, M.D., for a surgical consultation. On March 30, 2004, Dr. Hered performed a microdiskectomy at L5-S1 on the right side. Dr. Hered described the surgery as successful. Claimant returned to Dr. Mills and, on July 26, 2004, was provided a permanent partial impairment rating of 15 percent to the body as a whole pursuant to the fourth edition of the AMA *Guides*.[8] Dr. Mills originally rated claimant at 13 percent to the body, but rounded the impairment to the nearest percent ending in zero or 5, citing page 2/9 of the AMA *Guides*.[9]

Claimant had been examined by Pedro A. Murati, M.D., board certified in physical medicine and rehabilitation, for an injury occurring at a prior employer, identified as Ellsworth Motor Freight. This examination took place on July 29, 2002. At that time, claimant indicated complaints of pain in his neck, with numbness in his fingers and headaches. Claimant worked for that company as a truck driver. At that time, Dr. Murati rated claimant at 19 percent to the whole person pursuant to the fourth edition of the AMA *Guides.*[10]

Dr. Murati was provided a list of tasks which was prepared by vocational expert Jerry Hardin relative to the December 2003 accident. Dr. Murati then provided his opinion, based on the restrictions he issued on July 29, 2002, relative to claimant's prior accident, as to how many of those tasks claimant was unable to perform as a result of the 2002 injury while working for Ellsworth Motor Freight. Dr. Murati found claimant unable to perform 18 of 27 non-duplicative tasks, for a 67 percent task loss as a result of the April 2002 injury.[11]

A task list prepared by Jerry Hardin was also provided to Dr. Mills. After reviewing the task list, Dr. Mills determined that of the 33 non-duplicative tasks on the list, claimant was unable to perform 25, for a 76 percent task loss.

After leaving respondent's employment and after undergoing surgery, claimant made approximately 30 job applications, including registering with two to three job

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[8] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[9] AMA *Guides* (4th ed.).

[10] AMA *Guides* (4th ed.).

[11] Murati Depo. at 10-12.

placement centers, in a period of approximately one year.[12] Vocational expert Steve L. Benjamin testified that in his opinion, an individual should apply at at least 100 jobs in a year in order for it to be a good faith effort to seek employment. The ALJ determined that claimant had not put forth a good faith effort to try to obtain a job after leaving respondent's employment and, therefore, imputed to him the $260 per week, which Mr. Hardin believed claimant was capable of earning. This resulted in a wage loss of 23 percent when compared to a wage of $338.60. However, as noted above, the parties have stipulated to an average weekly wage of $380.20. This would compute to a 32 percent wage loss when compared to the stipulated wage.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[13]

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[14]

In this case, the record contains only one functional impairment rating dealing with this particular injury. Respondent argues that Dr. Mills inappropriately rounded up the functional impairment from 13 percent to 15 percent, thereby giving claimant an undeserved reward. However, the doctor, when asked why he rounded up, cited page 2/9 of the AMA *Guides*.[15] Page 2/9 of the AMA *Guides*[16] states:

> A final estimated whole-person impairment percentage, whether it is based on the evaluation of one organ system or several organ systems, may be rounded to the nearer of the two nearest values ending in 0 or 5.

While respondent may object to Dr. Mills rounding of the impairment percent, it is obvious that there was justification for the doctor's actions. The Board, therefore, finds that

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[12] According to Mr. Benjamin (who interviewed claimant on May 23, 2005), claimant told him that since his last day of work, he had applied for approximately 30 jobs. (*See* Benjamin Depo. at 11.) However, claimant testified at the regular hearing of May 2, 2005, that he applied at two to three places a week. (*See* R.H. Trans. at 21-22.)

[13] K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

[14] K.S.A. 44-510e(a).

[15] AMA *Guides* (4th ed.).

[16] AMA *Guides* (4th ed.).

Dr. Mills' opinion that claimant has suffered a 15 percent impairment to the body as a whole is appropriate.

K.S.A. 44-510e, in defining permanent partial general disability, states that it shall be:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

In determining what, if any, wage loss claimant has suffered, the statute must be read in light of both *Foulk*[17] and *Copeland.*[18] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[19]

In this instance, respondent contends that claimant failed to act in good faith by refusing to undergo a mandatory urinalysis test, which resulted in claimant's termination. Mr. Chanley testified that this employer did everything within its power to accommodate a worker within his or her restrictions and that accommodation would be at the salary at which the worker was hired. Mr. Gray testified that claimant was warned that the refusal to undergo the urinalysis test for drugs and alcohol would result in his termination.

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[17] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[18] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[19] *Id*. at 320.

Mr. Gray also testified that this company regularly accommodated persons and that the company always had something for them to do.[20]

The test of whether a termination disqualifies an injured worker from entitlement to a work disability is a good faith test on the part of both the claimant and the respondent.[21] In this instance, claimant was terminated for violating respondent's policy, in particular, the refusal to provide a urinalysis test after a work-related accident. Claimant was warned as to the potential ramifications of his refusal.

Claimant testified to being unable to urinate due to the pain, yet testified he was also urinating blood on both the date of accident and the day after the accident, which would have been the day claimant was at the clinic, attempting to provide the urine sample. Claimant provides no explanation for this apparent contradiction.

The Board finds claimant's actions in refusing to cooperate with the urinalysis, which resulted in his termination, does not constitute good faith on the part of the claimant. Therefore, the Board finds that the termination of claimant on that date was justified and claimant's lack of good faith in attempting to retain his employment violates the policies set forth in *Copeland* and *Foulk*. The Board will, therefore, impute to claimant the wages he would have earned at respondent's employment had he not been terminated. As noted by Mr. Chanley, this would have been the wage at which claimant was hired. Claimant, therefore, would have been earning a wage comparable to that which he was earning at the time of the accident. Pursuant to K.S.A. 44-510e, claimant is limited to his 15 percent whole person functional impairment for the purposes of this award.

The above finding renders moot any determination regarding what, if any, permanent partial general disability under K.S.A. 44-510e claimant would have suffered, including what, if any, task loss claimant suffered as a result of these injuries.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the December 7, 2005 Award of Administrative Law Judge Thomas Klein should be, and is hereby, modified, and claimant is awarded a 15 percent impairment to the body as a whole on a functional basis pursuant to K.S.A. 44-510e for the injuries suffered arising out of and in the course of his employment on December 7, 2003.

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[20] Gray Depo. at 15.

[21] *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App. 2d 278, 28 P.3d 398 (2001).

Claimant is entitled to 21.86 weeks of temporary total disability compensation at the revised rate of $253.48 per week totaling $5,541.07. Thereafter, claimant is entitled to 61.22 weeks of permanent partial general disability compensation at the rate of $253.48 per week totaling $15,518.05, for a total award of $21,059.12, all of which is due and owing and ordered paid in one lump sum minus any amounts previously paid.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of April, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Phelps, Attorney for Claimant
John David Jurcyk, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director